

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

KEVIN FERNANDEZ,
 Plaintiff,
 vs.
 DR. CENTRIC, et al.,
 Defendants.

3:12-cv-00401-LRH-WGC

ORDER

District Judge Larry R. Hicks has remanded Plaintiff's Motion for Sanctions for Defendants' Spoilation (sic) of Evidence (Doc. # 151)¹ to this court for further consideration. As directed, this order will address the legal and factual issues presented by Plaintiff's motion.

I. Background

On May 30, 2013, Plaintiff filed a motion for sanctions for Defendants' alleged spoliation of evidence. (Doc. # 151.) The court ruled on Plaintiff's motion in Docs. # 200 and # 201; Plaintiff's motion was denied (Doc. # 201 at 2, ¶ 6). Plaintiff's motion to seal exhibits (Doc. # 152), which was filed in support of his motion for sanctions, was granted in this court's minute order. (Doc. # 204.) Plaintiff later moved to "correct" the court's order denying his motion for sanctions. (Doc. # 212.) The court addressed Plaintiff's motion to correct in another order. (Doc. # 221.) In that order, the court determined that even if Defendants confiscated and destroyed Plaintiff's biological evidence, Plaintiff's motion for sanctions (Doc. # 151) was moot because the cause of action to which the alleged spoliation appeared relevant (Eighth Amendment claim for involuntarily ingesting a laxative) had been dismissed and thus Plaintiff's claims of spoliation pertaining to that cause of action was moot. (Doc # 221 at 2-4.)

¹ Refers to court's docket number.

1 This court's analysis of the pertinence of the biological and/or photographic was stated as
2 follows:

3 One of Plaintiff's numerous pending motions to compel pertains, *inter*
4 *alia*, to the production of photographs of "fecal matter and cups of urine
5 which were referenced in the officer's incident report... ." (Doc. #192-2
6 at 2-3.) Defendants responded to Plaintiff's request for production #1,
7 sixth set, stating that the "fecal matter in plastic wrap and plastic bags of
8 urine were secured in bio-hazard containers and disposed of;
9 photographs or digital video images were not taken by officers to
10 Defendants' knowledge." (*Id.*, at 3.) Therefore, this purported drugging
11 evidence is no longer in existence.

12 Doc. # 221 at 2:22-28.

13 This court concluded, however, even if this evidence was disposed of, wrongfully or otherwise,
14 because Plaintiff's Eighth Amendment claims relating to an assertion Defendants put a laxative in his
15 food had been dismissed (Doc. # 116 at 22, 23, 38; Doc. # 217 at 5), any such evidence which was
16 destroyed was irrelevant to this constitutional allegation. (Doc. # 221 at 2-4.) However, following
17 consideration of Plaintiff's objections to this order (Doc. # 228), Judge Hicks perceived this spoliation
18 allegation might be relevant to Plaintiff's claim he was involuntarily admitted into the prison's Mental
19 Health Unit and his being labeled—and treated—as mentally ill. (Doc. # 227 at 2.) Judge Hicks remanded
20 Plaintiff's motion (Doc. # 151) for further consideration by this court of this issue and several others, i.e.,
21 whether video recordings and photographs were disposed of and also whether Plaintiff has a viable
22 spoliation claim for Defendants' failure to administer a polygraph or secure blood work. (*Id.*)

23 Accordingly, the court now addresses Plaintiff's motion for spoliation and request for sanctions
24 from the standpoint of whether there has been any actionable spoliation

25 **II. Overview of Plaintiff's Motion for Sanctions (Doc. # 151)**

26 Plaintiff moved for sanctions because of "the Defendants' spoilation (sic) of evidence." (Doc.
27 # 151 at 1.) Plaintiff did not identify which "Defendants" should be subject to sanctions. However, it
28 appears from Plaintiff's motion that three to six individuals may have some involvement with the
29 confiscation of the biological evidence. Plaintiff's motion states:

30 On January 02, 2012, the Defendants Shorey, Willhite and Hogan
31 confiscated the biological evidence Plaintiff was keeping and destroyed
32 it.

33 Doc. # 151 at 3.

1 Plaintiff additionally alleges he told two other Defendants, Burchett and Schober—whom he states
 2 "controlled the scene"—that this biological material "was evidence which proved Plaintiff was being
 3 drugged through his food." (*Id.*) Plaintiff further avers that "it is likely Defendants Burchett and Schober
 4 ordered them to do it." (*Id.* at 8.) Plaintiff alleges that "this evidence is directly related to whether
 5 Defendants Shepherd and Rhalston drugged Plaintiff's food." (*Id.* at 6.) He also asserts that "Shorey,
 6 Willhite and Hogan destroyed the evidence intentionally." (*Id.* at 8.)²

7 The affidavit of Plaintiff Fernandez which accompanied the motion (Doc. # 151 at 21-22)
 8 provides a somewhat different scenario. In ¶ 9 of Plaintiff's affidavit, he states on January 2, 2012, he
 9 advised "Defendants Burchett, Schober and Moe" that the "urine and human waste" in his cell "were
 10 evidence of [his] being drugged with laxatives by officers and that his evidence should be saved and
 11 tested." In ¶ 10, he states he told officers Lamb, Moe and Schober "the urine and food samples were
 12 evidence of [his] being drugged by NDOC³ officers with laxatives." Plaintiff's affidavit, unlike his
 13 motion, does not assert which officers confiscated the biological evidence. Nevertheless, based upon the
 14 assertions found in both the motion and affidavit, it appears that a total of six NDOC correctional
 15 officers are possibly implicated by Plaintiff in this activity, thus presumably constituting the makeup of
 16 the "Defendants" about whom Plaintiff complains for the confiscation and spoliation of this evidence.

17 Plaintiff also contends as part of his spoliation claims the Defendants also took photographs and
 18 video taped the "drugging." (*Id.* at 2.) He avers also the "video, photographs and audio recordings are
 19 relevant to every claim presented by Plaintiff. (*Id.* at 7.) He alleges the Defendants (again, without
 20 specifying which Defendants) "have intentionally destroyed the urine samples and food samples and
 21 failed to preserve...video and audio recordings, and polygraph evidence." (Doc. # 151 at 6.)⁴

22
 23
 24 ² The "drugging" of Plaintiff's food is not specifically discussed in Plaintiff's affidavit. However, his motion states
 25 that on November 11, 2011, his food was "drugged by an NDOC officer." It appears he alleges a recurrence of "drugging"
 26 on December 4, 2011. (Doc. # 151 at 2.) At page 6, he alleges it was Defendants Shepherd and Rhalston who drugged his
 27 food. However, Defendants Shepherd and Rhalston, the custodial officers who allegedly drugged his food, are apparently
 28 not the subject of Plaintiff's request for sanctions.

³ Nevada Department of Corrections.

⁴ As discussed later in this order at page 15, and as noted by Judge Hicks in his order (Doc. # 277, n. 2), there never
 was any "polygraph evidence." Instead, Plaintiff's claim is predicated upon an assertion the "Defendants failed to provide
 Plaintiff with a polygraph examination." (Doc. # 151 at 10.)

1 Plaintiff also implicated another Defendant in his motion, Warden Palmer. He states that on
2 November 11, 2011, Plaintiff's family called Palmer "to advise him Plaintiff's food was drugged with
3 a laxative" and that Plaintiff had "saved samples of the food tray and urine and they needed to be picked
4 up and preserved." (*Id.* at 11.) Plaintiff also alleges that he wrote Palmer a memorandum on
5 November 15, 2011, requesting him "to pick up the evidence" and that "Palmer and Defendants failed
6 to do so." (*Id.* at 11.)

7 Last, Plaintiff alleges the Defendants "failed to provide Plaintiff with a polygraph examination
8 to preserve this evidence" (Doc. # 151 at 10) and that "Defendants also failed to investigate or take blood
9 samples" (*id.* at 11).

10 The foregoing sets forth the gravamen of Plaintiff's claims. The details of the nature of the
11 alleged spoliation are addressed later in this order at pages 6-9. However, prior to addressing the request
12 for sanctions and the alleged misconduct giving rise to the claims of spoliation, the court expresses its
13 concern about the identity of the Defendant(s) against whom Plaintiff seeks sanctions.

14 Technically, when Plaintiff filed his spoliation motion against the "Defendants" on May 30,
15 2013, the only persons involved in the alleged spoliation were Defendants Schober and Palmer.
16 Defendants Willhite, Hogan, Burchett, Moe and Lamb were not then Defendants in this matter. It is
17 problematic whether this court can even entertain a motion for sanctions for spoliation against
18 individuals where were not defendants when the motion was filed.⁵

19 Although procedurally this is a potentially fatal flaw to Plaintiff motion, at least as to certain
20 Defendants, the court will not dispose of Plaintiff's motion on procedural grounds but will, instead, turn

21
22 ⁵ Plaintiff's motion did not specifically identify which of the "Defendants" he was targeting. When Plaintiff filed his
23 motion on May 30, 2013, the only correctional officer involved in the spoliation who was then a named defendant was
24 correctional officer Schober. (Screening Order, Doc. #3; Answer, Doc. # 57.) Plaintiff had filed a motion to amend his
25 complaint on November 29, 2012, which identified the correctional officers named in the motion as proposed parties
26 defendant. (Doc.# 72.) Plaintiff also filed a motion to amend/correct his complaint on December 20, 2012 (Doc # 86),
27 followed by numerous errata regarding his proposed amendment on January 2, 2013. (Doc. ## 91, 92, 93.) This court
28 thereafter evaluated the proposed amended complaint and errata, and a Report and Recommendation of Plaintiff's proposed
amendment was entered on February 15, 2013. (Doc. # 112.) Plaintiff filed his objection to the report and recommendation
on March 8, 2013 (Doc. # 126); Defendants filed an opposition to Plaintiff's objection on May 22, 2013. (Doc. # 140.) The
court later granted Plaintiff leave to file a reply to Defendants' opposition, which reply was filed on September 17, 2013.
(Doc. # 215.) District Judge Hicks thereafter entered an order on September 18, 2013, adopting and accepting the report and
recommendation. (Doc. # 217.) As a result of the order, correctional officers Willhite, Hogan, Burchett, Moe and Lamb were
added to the litigation. However, it was not until Judge Hicks entered the order allowing the amendment of Plaintiff's action
that all NDOC officers involved in the incident became "Defendants."

1 to a substantive analysis of Plaintiff's motion. (Doc. # 151.)⁶

2 **III. Legal Standard**

3 The courts have held that if a party has engaged in unjustified spoliation of evidence, sanctions
4 may be imposed. Magistrate Judge George Foley cogently reviewed the relevant law on this subject in
5 *Anderson v. Wal-Mart Stores, Inc.*, No. 2:10-cv-02245-GMN-GWF, 2012 WL 300878 (D. Nev. 2012):

6 The court has the inherent authority to impose sanctions based on a
7 party's failure to preserve relevant evidence. Sanctions may be imposed
8 if the party was on notice that the evidence was potentially relevant to
9 pending or reasonably foreseeable litigation and failed to take reasonable
10 steps to preserve it. *United States v. \$40,955 In U.S. Currency*, 554 F.3d
11 752, 758 (9th Cir.2009); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th
12 Cir.2006); and *United States v. Kitsap Physicians Serv.*, 314 F.3d 995,
13 1001 (9th Cir.1992). See also *Anderson v. Wal-Mart Stores, Inc.*, 2011
14 WL 4621286, at *3-*4 (D.Nev.2001). The forms of sanction may include
15 (1) an instruction to the jury that it may draw an inference adverse to the
16 party or witness responsible for destroying the evidence, (2) an order
17 excluding witness testimony proffered by the party responsible for
18 destroying the evidence, or (3) and dispositive order dismissing the
19 complaint or entering a default judgment. *In re Napster*, 462 F.Supp.2d
20 1060, 1066 (N.D.Cal.2006). See also *Powell v. Texvans, Inc.*, 2011 WL
21 1099120, *4 (D.Nev.2011) and *Morford v. Wal-Mart Stores, Inc.*, 2011
22 WL 635220, *3 (D.Nev.2011). While a finding of bad faith is not
23 required for the imposition of sanctions, "a party's motive or degree of
24 fault in destroying evidence is relevant to what sanction if any, is
25 imposed." *In re Napster*, 464 F.Supp.2d at 1066-67, citing *Baliotis v.*
26 *McNeil*, 870 F.Supp. 1285, 1291 (M.D.Pa.1994). Courts should choose
27 "the least onerous sanction corresponding to the willfulness of the
28 destructive act and the prejudice suffered by the victim." *Schmid v.*
Milwaukee Electric Tool Corp., 13 F.3d.76, 79, (3rd Cir.1994); *Dillon v.*
Nissan Motor Co., Ltd., 986 F.2d 263 (9th Cir.1993). See also *Leon v.*
IDX Systems Corp., 464 F.3d 951, 959 (9th Cir.2006).

20 These authorities, and others cited in this Order, demonstrate that if relevant evidence has been
21 shown to exist, and if the possessor of that evidence was on notice that the evidence was potentially
22 relevant to litigation which was reasonably foreseeable, and if that party failed to take reasonable steps
23 to preserve it, sanctions may be imposed upon that party. The nature of the sanctions will depend on the
24 party's motive or degree of fault in not preserving that evidence. This court will now turn to a review
25 of the factual background of Plaintiff's motion.

26 ///

28 ⁶ However, the court invites the parties to address the intriguing paradox about "Defendants" when the parties file their respective memoranda in response to this order.

IV. Review and Discussion of the Components of Plaintiff's Spoliation Motion

As discussed above, it appears there are five aspects to Plaintiff's motion for spoliation of evidence. One relates to the confiscation and destruction of the biological evidence (urine and feces). The second pertains to whether photographs or video recordings of the seizure of the biological evidence and/or "drugging" was destroyed (if it was recorded). The third relates to whether Warden Palmer was advised to "pick up the evidence," whether he failed to do so and if so, his explanation. The fourth and fifth are whether Plaintiff's request to undergo a polygraph examination, and to obtain blood tests, which he contends Defendants failed to provide, gives rise to a viable spoliation claim.

The court will address in greater detail these aspects of Plaintiff's spoliation motion.

a) The Alleged Spoliation of Biological Evidence

As addressed above, this claim of spoliation relates to an assertion "Defendants Shorey, Willhite and Hogan confiscated the biological evidence and destroyed it." (Doc. # 151 at 3.) There is no dispute that these materials were seized and disposed of. Indeed, the discovery and disposition of this biological material was the subject of an exhibit filed by Defendants in response to Plaintiff's Motion for a Temporary Restraining Order/Preliminary Injunction, Doc. # 13-1. This document, an NDOC incident report regarding the discovery of the plastic-wrapped urine and feces in Plaintiff's cell, was filed under seal. In light of Plaintiff's motion for sanctions for spoliation which references the Plaintiff's actions which are the subject of this NDOC report, Doc. # 13-1 at 9-11 will now be unsealed and published by the court.

This NDOC report reads in pertinent part as follows:

Occurrence Date: 01/02/2012

Narrative

Unit 7B Reported that inmate Fernandez 20483 would not remove covering from his bed blocking the officers view. Upon further interviewing and cell shake down, it was determined that inmate Fernandez was moved to Unit 8B after a psychological evaluation was conducted. No force was used. AW Shreckengost was notified.

* * *

SHOREY, ERIC
Comment: Unit Staff

Participant

Reports

Report Type Report Detail

INC028 On January 02, 2012 Correctional Officers E. Shorey,

C. Willhite, J. Hogan conducted a cell search and cell inspection of unit-7-B-40. This is where inmate Fernandez, K. #20483 was assigned alone. Upon starting the search of the cell a horrible stench generated from the bunk area. Upon further inspection we observed that inmate fernandez (sic) was rolling fecal matter in plastic wrap and storing it in containers an plastic bags. Also he had cups of urine stored. The items were recovered and secured in Bio- Hazard (sic) containers and disposed. Inmate fernandez (sic) was reassigned to the medical unit an his remaining property inventoried and secured.⁷

* * *

BURCHETT, SCOTT
Comment: Shift Commander

Reporting

Report Type **Report Detail**

INC028 On January 02, 2012 at approximately 9:30 a.m. I, Sergeant (Sgt) Scott Burchett, received a call for Correctional Officer (C/O) Shorey stating that an Inmate (I/M) Fernandez, Kevin #20483 refused several orders to remove the coverings hanging from his bed blocking the view of the officers. I/M Fernandez was told if he did not remove the coverings from the bed that the shift supervisor would be notified. I/M Fernandez told staff to go ahead and notify the shift supervisors. Myself and Sgt. Schober responded from Operations to speak with I/M Fernandez. I/M Fernandez was asked to submit to restraints in which he did. While I/M Fernandez was out of his Cell, a compliance check was done. During this check numerous containers of what appeared to be Feces were found. When I/M Fernandez was asked why he had these he told us he could not use the toilet because this was the signal to the staff to go tell all the other inmates on the tier what he was doing. Myself and Sgt. Schober decided to have IM Fernandez be given a mental health evaluation by the Mental health staff on duty. It was determined by mental health staff that I/M Fernandez remain in Unit 8B for evaluation. No further issues. Property secured by Unit 7B staff and AW Schreckengost notified. End of Report

SCHOBBER, ROBERT

Participant

Report Type **Report Detail**

INC028 On January 02, 2012 I Sgt. Schober reported to unit 7B at approximately 9:50 a.m. Unit officers called and informed Sgt. Burchett that Inmate Fernandez #20483 housed in cell 40 would not remove his covering so officers could see this inmate. I went to inmate Fernandez's Cell and asked him to comply with being placed in wrist restraints, he complied. This was done so I could talk with the inmate with out other inmates listening. This inmate was moved to a shower away from other inmate cells. I then asked why he would not take

⁷ NDOC Unit Staff Officers Curtis Willhite and James Hogan, entered this same narrative on the NDOC report.

1 down the covering blocking the unit officers view. Inmate
 2 Fernandez #20483 informed me that he wad being watched
 3 24/7 and that he could not even go to the toilet because it did
 4 not work. Sgt. Burchett checked the toilet and found it to be
 5 in working order. This inmate then informed me that officers
 6 were out to get him by using other inmates to make claims
 7 against he (sic). I was informed that this inmate had been
 8 saving his feces in baggies and saran rap (sic). I then had
 9 Officer Shorey call medical to get permission to have inmate
 10 Fernandez evaluated. Inmate Fernandez #20483 was then
 11 taken over to medical unit 8B and was seen by Phys Nurse J.
 12 Lamb. (Time was 10:05 a.m.) The inmate was placed in unit
 13 B for further evaluation.

14 Doc. # 13-1 at 9-11.

15 Thus, there is no dispute this material was confiscated and destroyed. What is different between
 16 the descriptions of the events by Defendants and Plaintiff is that there is no mention in the NDOC
 17 reports (which the correctional officers apparently prepared contemporaneous with the events) that
 18 Plaintiff told any of the correctional officers he was attempting to preserve feces and urine for use in
 19 prospective litigation, as Plaintiff claims. Instead, the reports stated Plaintiff informed the officers he
 20 stored his urine and feces in plastic bags because of an alleged inability to use the toilet. According to
 21 the reports, he claimed if he had used the toilet, staff would then "go tell all the other inmates on the tier
 22 what he was doing." (*Id.*, Schober Report.)

23 The issue is thus narrowed as to whether the correctional officers were advised by Plaintiff of
 24 his intentions to use this evidence in support of litigation he was contemplating and, if yes, why they
 25 undertook the actions they did (to dispose of the material). Therefore, **on or before May 30, 2014**,
 26 Defendants' counsel is directed to submit a declaration from one or more of the individuals involved in
 27 this incident, addressing:

- 28 (1) the nature of the initial report beyond what is outlined above, if any;
- (2) the motivations of those involved in confiscating and disposing of the biological material;
- (3) whether inmate Fernandez advised any of the NDOC officers that there was a likelihood of
 litigation and that he needed to preserve this evidence for litigation. If the declarant states Plaintiff
 communicated this information, the declarant shall explain all further actions taken thereafter; and
- (4) any other subject which the declarant(s) wish to address regarding the alleged spoliation.

Plaintiff shall thereafter have an opportunity to submit to the court, **on or before June 20, 2014**,

1 by declaration any additional facts beyond those recited in his motion (Doc # 151) and attachments.
 2 Plaintiff shall also address what facts or other information he has which would make the biological
 3 evidence relevant, i.e., how this biological evidence would confirm Plaintiff was directly or
 4 surreptitiously forced to ingest a laxative, and what medical or scientific information Plaintiff has which
 5 would establish that ant such test would reveal the presence of a laxative. Additionally, Plaintiff shall
 6 explain to the court by whom he expected to have this testing performed and at whose expense. Last,
 7 Plaintiff shall identify against which Defendants he seeks to have sanctions imposed.

8 The parties shall also each address, with respect to this specific topic, relevant authorities
 9 pertaining to spoliation and/or a failure to preserve evidence insofar as it relates to these constitutional
 10 claims asserted by Plaintiff.

11 **b) The Alleged Failure to Preserve Photographic Evidence**

12 As discussed above, Plaintiff claims the Defendants also took photographs and video taped not
 13 only the confiscation of the biological evidence but also his ingesting a laxative. (Doc. # 151 at 3.)
 14 Plaintiff also states that the "photographs from September 29, 2011, which Wilson took, support and
 15 relate to Plaintiff's claim of retaliation." (*Id.* at 7.) Officer Wilson, who was not added as a defendant
 16 until Judge Hicks' order of September 18, 2013 (Doc # 217), does not appear to be mentioned elsewhere
 17 in the motion.

18 Plaintiff also makes no specific reference to whoever supposedly "destroyed" the photographic
 19 evidence, assuming there ever was any such evidence. (Doc. # 151 at 6.) According to Defendants, no
 20 such "evidence" ever existed. In that regard, in Exhibit P to Plaintiff's motion, Plaintiff set forth the
 21 following responses Defendants provided to Plaintiff's First Request for Production regarding
 22 photographic or visual evidence:

23 Request for Production No 26:

24 Produce and identify all video, digital, and audio recordings of plaintiff
 25 while in Unit 7A and B, while in the exercise yard being escorted to or
 26 from those units, and while in the Mental Health Unit at NNCC from
 27 September 14, 2011 though January 16, 2012.

28 Response to Production No. 26:

* * *

Notwithstanding these objections, and without waiving them, Defendants
 are not aware of any such video or audio recordings from movements of

1 Plaintiff on the exercise yard or during escort from September 14, 2011
2 and January 16, 2012.

3 Doc. # 151 at 3; pp.39-40 (Exh. P).

4 Plaintiff's motion also references Defendants' Response to Plaintiff's Second Request for
5 Production, Request No. 5 as follows:

6 Request for Production No. 5:

7 Produce and identify each and every video, digital and audio record of
8 Plaintiff while Plaintiff was incarcerated at the Northern Nevada
9 Correctional Center in Unit 7A, Unit 7B, the Mental Health Unit, and
while Plaintiff was being escorted on the exercise yard during the time
between September 14, 2011 through January 16, 2012.

10 Response to Production No. 5:

11 * * *

12 Notwithstanding these objections and without waiving them, Defendants
13 reiterate that they have investigated this request and there are no
recordings that would be responsive to this request, therefore no response
is forthcoming to this request.

14 *Id.* at 3; pp. 41-42 (Exh. Q).

15 Plaintiff also refers to Defendants' responses to certain of Plaintiff's requests for admissions.
16 These responses reiterate what Defendants stated in their earlier discovery responses, i.e., there are no
17 video recordings or photographs which were made or retained during the September 14, 2001-January 2,
18 2012 time period:

19 Request for Admission No. 2:

20 Admit that from September 14, 2011 through January 02, 2012, Unit 7B
21 at NNCC had the capability of video recording persons within the unit.

22 Response to Admission No. 2:

23 Deny. Equipment was installed, but information indicates recording
ability wasn't present until after time referenced.

24 Request for Admission No. 3:

25 Admit that from September 14 through January 02, 2012 or during this
26 period, the Plaintiff was video recorded in Unit 7B at NNCC.

27 Response to Admission No. 3:

28 Deny. See Response no. 2.

Request for Admission No. 4:

Admit that during January 02, 2012 through January 05, 2012 Unit 8B-17A Cell had video recording cameras installed within it at the MHU at NNCC.

Response to Admission No. 4:

Deny. Any cameras for the unit and time reference were merely for observation, not recording.

Request for Admission No. 5:

Admit that during January 02, 2012 through January 05, 2012 Plaintiff was video recorded in Cell 8B-17A in the MHU at NNCC.

Response to Admission No. 5:

Deny, see response 4 above.

Id. at 3; pp. 43-45 (Exh. R).

This court emphasizes that the foregoing discovery responses, which consistently deny any such photographic evidence ever existed, were submitted by Plaintiff as exhibits accompanying his motion. On the other hand, other than his own contentions of how the NDOC camera systems were supposed to function, Plaintiff submitted no documentary evidence that in fact there were any photographs or video tapes substantiating Plaintiff's contentions.

Additionally, in another filing submitted by Defendants, the court was provided with further discovery responses which, for the third time, verify the absence of any photographs or video recordings:

Defendants' Response to Request for Production of Documents [Set Six]:

REQUEST FOR PRODUCTION NO. 1:

Produce each and every digital video images and/or photographs which were taken by correctional officers on January 02, 2012, of Plaintiff's cell at NNCC unit 7B 40A, including but not limited to the bags of fecal matter and cups of urine which were referenced in the officer's incident report. Report number IR-2012-NNCC-000004 filed on January 02, 2012, and appears in your exhibit 6 of Doc. #12 Def. Op. To Pl. Mtn for TRO and PI.

RESPONSE TO PRODUCTION NO. 1:

As indicated in IR-2012-NNCC-000004, the fecal matter in plastic wrap and plastic bags of urine were secured in Bio-hazzard containers and disposed of; photographs or digital video images were not taken by officer to Defendants' knowledge. Therefore, no further response is forthcoming to this request.

* * *

REQUEST FOR PRODUCTION NO. 3:

Produce each video recording and/or digital recordings from Unit 7B on January 02, 2012 at NNCC from 6:00 am through 12:00 pm.

RESPONSE TO PRODUCTION NO. 3:

* * * after a reasonable inquiry, Defendants were unable to locate any such video or digital recordings of Plaintiff from Unit 7B on January 02, 2012, at NNCC.

Doc. # 192-2 at 3 (Exh. B).

The foregoing discovery production (Defendants' Response to Plaintiff's Sixth Set of Requests for Production of Documents) also addresses the photographs which Plaintiff claims were taken by Officer Wilson and asserts that Defendants have not located any such photographs:

REQUEST FOR PRODUCTION NO. 8:

Produce each and every video recording, digital recording, video image, photographs, digital image, regardless of the form, which would have been produce by Jonathan Wilson, correctional officer, on September 29, 2011 of the cell door at NNCC at Unit 7B cell 40 and the video recording and/or digital recording from that unit on that day.

RESPONSE TO PRODUCTION NO. 8:

* * * Defendants have made a reasonable inquiry into whether or not any such video recording, digital (sic) or video image or photographs were produce by Officer Wilson on or about September 28 2011, and have not located any such documents. In addition, the document sought in this request are irrelevant and not related to the subject matter of this litigation involving the MHU in January 2012.

Id. at 6 (Exh. B).

The conclusion the court draws from these discovery responses is that the Defendants have consistently represented no photographs or video recordings were obtained or the relevant time period. Other than Plaintiff's unsubstantiated allegations photographs were taken and that recordings were made of the videos, the court is not aware of any evidence documenting the existence of any video tapes or photographs.

In most spoliation cases, there is no dispute certain evidence existed and that the evidence was destroyed. *See, e.g., U.S. v. Kitsap Physicians Services*, 314 F.3d 995, 1001 (9th Cir. 2002). However, in this matter, in light of Defendants' discovery responses, there is a serious issue whether the

1 photographic or video taped evidence Plaintiff claims was spoliated ever existed.

2 It is Plaintiff's burden to make a prima facie showing that this evidence existed. "The party
3 seeking spoliation sanctions has the burden of establishing the elements of a spoliation claim."
4 *Reinsdorf v. Skechers U.S.A., Inc. et al.*, 296 F.R.D. 604, 628 (C.D.Cal.2013) *citing Centrifugal Force,*
5 *Inc. v. Softnet Communication, Inc.*, 783 F.Supp.2d 736, 740 (S.D.NY.2011). One of the elements of a
6 spoliation claim is that the party must demonstrate the evidence actually existed and was destroyed.
7 *Genon Mid-Atlantic, LLC v. Stone & Webster*, 282 F.R.D. 346,357 (S.D.NY.2012), *citing Orbit One*
8 *Commc'ns v. Numerex Corp.*, 271 F.R.D. 429, 441 (S.D.NY.2010).

9 Plaintiff's motion has not demonstrated any photographs were actually taken or video recordings
10 made during the relevant time period. Plaintiff has failed to satisfy the burden imposed upon him to
11 establish the existence of this evidence. Accordingly, it logically follows there can be no spoliation of
12 evidence which the court cannot verify ever existed.

13 The component of Plaintiff's motion for sanctions relating to photographic and video taped
14 evidence is denied.⁸

15 **c. Failure to Preserve Evidence: Plaintiff's Request to Warden Palmer**

16 Plaintiff states he "wrote a memo to Palmer advising that he had relevant evidence that needed
17 to be picked up. Exh. G. Palmer, nor his agents picked up the evidence." (Doc. # 151 at 2.) An affidavit
18 of Plaintiff's mother, Dorothy Bedell, states that on or about September 21, 2011, she called Defendant
19 Palmer and communicated her son's allegations to him. She recites that Warden Palmer said "they would
20 look in to (sic) it." (*Id.* at 24, ¶ 5; Exh. B.) She represents she called again on or about November 11,
21 2011, asking that "he [Warden Palmer] pick up this evidence, which was "a sample of [Plaintiff's] urine
22 and the food as evidence." (*Id.* at 25, ¶ 8.) Plaintiff in his affidavit represents he made similar requests
23 to Warden Palmer "to pick up my evidence I had of constitutional violations." (*Id.* at 22; ¶ 6, Exh. B.)
24 Plaintiff's motion also references "Exhibit G" to his motion, filed under seal as Doc. # 152-2. This
25 document purports to be a November 15, 2011 memorandum to Warden Palmer wherein Plaintiff claims

26
27 ⁸ This conclusion is not to suggest Plaintiff cannot necessarily present evidence at trial, if this case proceeds that
28 far, as to his claims Defendant took photographs or recorded videos of his "drugging." This court's conclusion is simply no
sanctions are appropriate with respect to this disputed conduct. This court further notes, however, whatever evidence may
be admissible at trial is within the province of the District Judge.

he has "evidence that I wish to provide to authorities concerning" what Plaintiff described were "serious violations to my rights and my health." (*Id.* at 16.)⁹

The court does not have any responsive material from Defendants, particularly Defendant Palmer, regarding Plaintiff's assertion of Warden Palmer's failure to preserve this evidence. Accordingly, **on or before May 30, 2014**, Defendants shall submit a declaration(s) of Warden Palmer, and, if desired, any other NDOC personnel knowledgeable about the alleged requests for preservation of evidence. Defendants shall also provide legal authorities pertinent to these factual allegations as to whether they give rise to an actionable claim for spoliation.

Plaintiff may reply to Defendants' submission **on or before June 20, 2014**. Plaintiff shall also provide the court any additional facts Plaintiff has with respect to the request for preservation of evidence made to Warden Palmer. Plaintiff shall also address and provide the court legal authorities pertinent to these factual allegations as to whether they give rise to an actionable claim for spoliation.

d) Failure to Take Blood Samples

Other than Plaintiff's passing reference the "Defendants failed to take blood samples from Plaintiff to obtain the truth" (Doc. # 151 at 11), the court is unaware of any facts or even allegations with regard to this contention. Nevertheless, Defendants are directed to provide the court **on or before May 30, 2014**, any additional factual information regarding the alleged failure to take blood samples (Doc # 151 at 11) and to discuss legal authorities whether the failure to take blood samples constitutes an actionable spoliation claim.

Plaintiff's shall reply to Defendant's submission **on or before June 20, 2014**. Plaintiff shall also identify which Defendant(s) he believes should be subject to an imposition of sanctions for the alleged failure to secure blood samples. However, as with the issue of analysis of the urine and feces samples,

⁹ Exhibit G (Doc. # 152-2 at 16) did not specifically refer to "biological evidence." The text of Plaintiff's request to the Warden in Exhibit G, which the court "unseals," reads as follows:

Finally, there is a serious violation to my rights and my health. I've already had my family call on 11/11/11. I have evidence that I wish to provide to authorities concerning this. I need to speak to someone very soon concerning this. Please have someone come to speak to me concerning this. Thank you.

Doc. # 152-2 at 16.

1 Plaintiff is also directed to identify medical or scientific literature which would establish that a blood
 2 test would reveal the presence of a laxative. Additionally, Plaintiff is to explain to the court by whom
 3 he expected to have this testing performed and at whose expense.

4 **e) Failure to Administer Polygraph Examination**

5 Plaintiff states that "the Defendants failed to provide Plaintiff with a polygraph examination to
 6 preserve this evidence." (Doc. # 151 at 10, 11.)

7 The Defendants are directed to provide the court **on or before May 30, 2014**, any additional
 8 factual information regarding the alleged failure to administer a polygraph examination and to discuss
 9 legal authorities whether the failure to administer a polygraph examination constitutes an actionable
 10 spoliation claim. Plaintiff shall reply to Defendants' submission **on or before June 20, 2014**. Plaintiff
 11 shall also identify which Defendant(s) he believes should be subject to an imposition of sanctions, if the
 12 court were to impose sanctions for this failure, and what a polygraph examination was expected to reveal
 13 with respect to Plaintiff's claims the Defendants forcibly medicated him with a laxative.

14 **f) Spoliation: I-File**

15 Plaintiff's motion (Doc. # 151) also alleged Defendants lost a portion of Plaintiff's Institutional
 16 File (I-File). The court addressed this contention at a hearing on August 19, 2013. The Court granted in
 17 part Plaintiff's motion to compel production of his complete I-File. (Doc. # 201 at 3.) Defendants were
 18 directed to either produce the entire file or explain what effort has been undertaken to locate the missing
 19 portion and were provided 30 days to supplement their discovery filings. (*Id.* at 5.) Defendants
 20 subsequently reported the missing sections of Plaintiff's I-File were located and were sent to Ely State
 21 Prison for Plaintiff to review. (Doc. # 216 at 2-3; Doc. # 216-1 (Exh U); Doc. # 216-2 (Exh. V); Doc.
 22 # 216-3 (Exh. W); Doc. # 216-4 (Exh. X); and Doc. # 216-5 (Exh. Z).)¹⁰

23 Thus, the Plaintiff's I-File is no longer relevant to Plaintiff's spoliation motion, particularly since
 24 this court further determined that there was no prior preservation order regarding the I-file. (Doc. # 221
 25 at 4-5.) Therefore, the court will not request nor entertain any further briefing on the subject of Plaintiff's
 26 I-File relating to any spoliation claim.

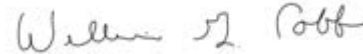
27
 28 ¹⁰ Neither Plaintiff's Motion to Correct Order (200/201) nor Plaintiff's Motion for Review of Order # 221 argued the I-File issue was still pertinent to the spoliation issue.

CONCLUSION

The parties are directed to address spoliation issues as more specifically delineated in this order.

IT IS SO ORDERED.

DATED: May 15, 2014



WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE